BEFORE THE
FEDERAL COMMUNICATIONS COMMISSION
WASHINGTON, D.C.

In the Matter of	)	
	)	
Review of the Commission's Rules Regarding	)	**WC Docket No. 03-173**
The Pricing of Unbundled Network Elements	)	
And the Resale of Service by Incumbent	)	
Local Exchange Carriers	)	

REPLY COMMENTS OF THE ARIZONA CORPORATION COMMISSION

I. Introduction

On September 15, 2003, the Federal Communications Commission ("FCC" or "Commission") released a Notice of Proposed Rulemaking ("NPRM") soliciting comment on tentative conclusions and modifications to its current UNE pricing regime that seek to "preserve its forward-looking emphasis and its pro-competitive purposes, while at the same time making it more transparent and theoretically sound." NPRM at p. 4. The NPRM then goes on to discuss specific changes to the FCC's current TELRIC rules which would in some cases dictate particular values on critical inputs of the models used by State Commissions to determine TELRIC rates. Initial comments were filed by several Competitive Local Exchange Carriers ("CLECs"), Incumbent Local Exchange Carriers ("ILECs") and State Commissions. The Arizona Corporation Commission ("ACC" or "Arizona Commission") submits these reply comments in response to the initial comments filed in this docket.

II. Discussion

A. The FCC Should Refrain From Developing "National" Inputs Which Would Predetermine the Outcome of TELRIC Rates at the State Level

The ACC agrees with those commenters who urge the Commission to refrain from adopting a uniform set of inputs which would result in a predetermined result at the State level with respect to the rates ILECs are required to charge competitors for unbundled network elements.[1] The ACC recognizes the historic tension that has always existed with respect to the appropriateness of a national one-size-fits all approach versus a more granular approach which recognizes the importance of market specific differences that vary on a State by State basis. The ACC believes that the FCC's current rules give States the flexibility needed to achieve results which reflect the Telecommunications Act of 1996's ("1996 Act") goals, and are also consistent with the FCC's stated objectives in its NPRM.

Section 252(d) of the 1996 Act delegates to State Commissions the responsibility for determining just and reasonable rates for interconnection and unbundled network elements. In delegating this responsibility to State Commissions, Congress recognized the historic and central role of State Commissions in the intrastate ratemaking process because the unbundled network elements at issue are to be used for the provision of local service, over which the States have exclusive jurisdiction. While the U. S. Supreme Court recognized that the Commission could establish rules to guide State Commissions in their determinations under Section 252(d)[2], the ACC believes that some of the proposals of the FCC in this proceeding go far beyond what was intended in the 1996 Act. The establishment of specific input factors by the FCC which all States would be required to adopt in determining

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[1] See, inter alia, Comments of the New York State Department of Public Service, Comments of the Pennsylvania Public Utility Commission, Illinois Commerce Commission.

[2] Iowa Utilities Board v. FCC, 120 F.3d 753 (8th Cir. 1997) aff'd in part and remanded, AT&T v. Iowa Utilities Board, 525 U.S. 366 (1999).

appropriate TELRIC rates, reduces the States' role in this process from one in which they are authorized to determine the appropriate rate levels to one in which they are merely producing rates in accordance with FCC prescribed inputs. In so doing, the FCC would be usurping the lawful role of the State Commission to determine what are "just and reasonable" rates for 252(d) purposes. The FCC's desire to assist or provide guidance to the State Commissions in this process is appreciated and welcomed. However, the ACC believes that the FCC should provide such guidance in a manner other than mandated prescription of the various inputs that are used in the State ratemaking process.

B. The FCC Should Provide Guidance to States in Setting Market-Based Rates When Applicable Under its New TRO Rules

The FCC sought comment in Paragraph 42 of the NPRM on the relationship between its new interpretation of Section 251(d)(2) for determining whether requesting carriers are entitled access to a UNE, and the Commission's UNE pricing rules. In the Triennial Review Order ("TRO"), the FCC determined that the Bell Operating Companies ("BOCs") have an independent obligation to make certain unbundled network elements available under Section 271 of the 1996 Act, irrespective of 251 requirements.[3] Thus, if the FCC delists a particular UNE, such as local circuit switching, the BOC would still be required under Section 271(c) to make that unbundled network element available to CLECs. The FCC went on to state that in such instances, TELRIC would not apply and market-based rates determined under a just and reasonable standard would be appropriate.

While the ACC agrees with the FCC's finding that the BOCs have an independent obligation to make UNEs available under Section 271(c), the rates that

[3] TRO at p. 14.

are charged for delisted UNEs or UNEs made available under Section 271, should still be subject to State Commission review and approval in the interconnection agreement and arbitration process. The ACC has historically ensured that market based rates for delisted UNEs are just and reasonable and believes that the States act as an important safeguard in such instances. The rates that are being set are for network components that comprise the provision of a purely intrastate or local service. In addition, Congress delegated to State Commissions the authority to determine just and reasonable rates for these intrastate network components.

Accordingly, the FCC should reaffirm the role of the States in reviewing and approving market-based rates for delisted UNEs or UNEs provided pursuant to the BOC's independent obligation under 271(c).

C. The FCC Should Refrain From Dictating the Process Used By State Commissions in Establishing UNE Rates

The ACC agrees with several other State Commissions that it is not appropriate for the FCC to dictate the process or timetable used by State Commissions in making UNE determinations.[4]

More specifically, in Paragraph 48 of its NPRM, the FCC solicited comment on the establishment of a national timetable under which States would be required to conduct new UNE cost proceedings to reset all rates in accordance with the new rules adopted by the FCC. The ACC recently concluded its second review of UNE rates in Arizona. That proceeding spanned several years and Qwest just implemented the new UNE rates ordered by the ACC in December of 2003. In setting those rates, the ACC acted pursuant to the authority given it by Congress in Section 252(d) and in accordance with existing FCC rules. The ACC developed an extensive record which carefully considered the positions of all parties. The ACC

[4]See, inter alia, Comments of the Pennsylvania Public Utility Commission and Comments of the Illinois Commerce Commission and Comments of the New York State Department of Public Service.

does not believe that there would be any public interest benefit in requiring the State Commissions to set aside their past determinations, or in requiring States to act pursuant to some expedited timetable to change the rates set in accordance with existing law for no beneficial purpose.

Nor does the ACC support the FCC's suggestion of a true-up mechanism for the difference between what a competitor pays for network elements under rates established pursuant to the current TELRIC rules and what the competitor would pay for the same facilities or services under rates established under new rules the FCC may adopt in this proceeding. See NPRM at para. 151. The ACC does not believe it is appropriate to suddenly "change the rules of the game" and apply them in a retroactive manner for no explained reason. The ACC and parties to the ACC's costing docket relied upon the FCC's existing rules in setting the current UNE rates in Arizona. It would be inappropriate to essentially set those rates aside based upon subsequently adopted FCC rules which had no force or effect at the time the UNE rates were set by the ACC.

D. The FCC Does Not Have Any Authority to Preempt State Pricing Determinations Made Pursuant to Section 251(d) of the 1996 Act

The FCC notes at Paragraph 40 of its NPRM that it "has offered incumbent LECs the opportunity to seek relief from the TELRIC pricing rules if they could demonstrate the rules had been applied to produce confiscatory rates." Also, the Commission did not foreclose the possibility of establishing a separate mechanism to recover embedded costs not recovered through UNE rates.

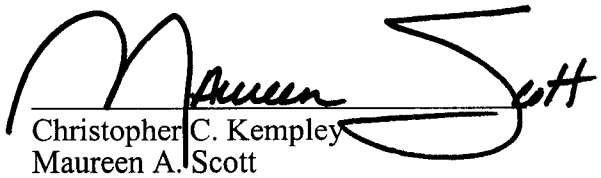
The ACC does not believe that the FCC has the authority to preempt State pricing determinations made pursuant to Section 251(d) of the 1996 Act. The States are acting pursuant to authority delegated to them by Congress. If Congress had wanted the FCC to make these determinations on a national basis, Congress would simply have given the FCC the authority to set just and reasonable rates, rather than the States. It did

not. The FCC cannot enlarge its authority through its own rules beyond that given it by Congress in the 1996 Act.

III. Conclusion

The FCC should refrain from establishing a set of "national" inputs which would predetermine UNE rates at the State level. The FCC should refrain from dictating to States the process to be used in conducting wholesale ratemaking proceedings at the State level. The FCC should set guidelines for the States in determining market-based rates for delisted UNEs or UNEs provided by the BOCs pursuant to their independent obligation under Section 271(c) of the 1996Act.

Respectfully submitted,



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